86 - 1176

No.

Supreme Court, U.S.
FILED
JAN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

---

**BRUCE LIPPO, d/b/a**
**"WALDEN - WOODFIELD SERVICE STATION",**
*Petitioner,*

v.

**MOBIL OIL CORPORATION,**
*Respondent.*

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

DAVIS CHIN*
105 West Madison Street
Chicago, Illinois 60602
(312) 726-6448

MICHAEL R. MCKENNA
25 East Washington Street
Chicago, Illinois 60602
(312) 372-7777

*Attorneys for Petitioner*

*Counsel of Record

Pandick Technologies, Inc., Chicago • (312) 236-0200

## QUESTIONS PRESENTED

1. Whether the action based on alleged wrongful non-renewal of the Plaintiff's gasoline service station franchise was rightly terminated by a Summary Judgement of Dismissal?

2. Does the rule of broad judicial restraint articulated by the Court below emasculate franchisee protection under the Petroleum Marketing Practices Act?

3. Can the constitutional right to trial by jury be denied by a patent misapplication of enunciated standards for summary judgment in the state of mind and credibility context?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 8 |
| 1. The Decision Below Effectively Negates the Protection Afforded Franchisees under the Petroleum Marketing Practices Act, Where the Franchisor Retaliates Against the Franchisee Forcing a Non-Renewal of the Relationship Through Arbitrary Contract Changes | 8 |
| 2. The Decision Below is Not In Accordance With Applicable Decisions Of This Court Because It Ignores The Standards Appropriate For Summary Judgment In The State of Mind And Creditability Context | 12 |
| CONCLUSION | 17 |
| APPENDIX: | |
| Opinion of the United States Court of Appeals for the Seventh Circuit | 1a |
| Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing | 11a |
| Unpublished District Court Memorandum Opinion dated November 22, 1983 | 12a |

| | Page |
|---|---|
| Unpublished District Court Memorandum Opinion dated September 11, 1985 | 25a |
| District Court Judgment dated September 27, 1985 | 34a |
| Excerpts of Deposition of C. A. Myers | 35a |
| Part of Exhibit B to the Affidavit of Thomas J. Kehoe Filed as Docket No. 24 | 41a |

## TABLE OF AUTHORITIES

**Cases:** *Page*

*Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) . . . . . 16

*Bellmore v. Mobil Oil Corp*, 524 F.Supp. 850 (D. Conn. 1981) . . . . . 10, 11

*Brach v. Amoco Oil Co.*, 667 F.2d 1213 (7th Cir. 1982) . . . . . 8, 10

*First Nat. Bank v. Cities Service Co.*, 391 U.S. 253 (1968) . . . . . 12

*Lippo v. Mobil Oil Corp.*, 776 F.2d 706 (7th Cir. 1985) . . . . . 7

*Lippo v. Mobil Oil Corp.*, 802 F.2d 975 (7th Cir. 1986) . . . . . 1

*Munno v. Amoco Oil Co.*, 488 F.Supp. 1114 (D.Conn. 1980) . . . . . 10, 11, 14, 15

*Pearman v. Texaco*, 480 F.Supp. 467 (W.D. Mo. 1979) . . . . . 10

*Poller v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962) . . . . . 16

*Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944) . . . . . 14, 16

*Simpson v. Union Oil Co.*, 377 U.S. 13 (1963) . . 11

*Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380 (10th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) . . . . . 9, 11, 14

*United States v. Diebold, Inc.*, 369 U.S. 654 (1962) . . . . . 12, 13

*Page*

**Statutes:**

15 USC 2801 . . . . . 2

15 USC 2801(13) . . . . . 12

15 USC 2802(b)(3)(A) . . . . . 2, 3

15 USC 2805(c) . . . . . 12

28 USC 1254(1) . . . . . 2

**Rules:**

Federal Rule of Civil Procedure 56 . . . . . 2

**Legislative History:**

S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, reprinted in (1978) U.S. Code Cong. & Adm. News 873 . . . . . 2, 8, 9, 10, 12

**Treatises:**

10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2D § 2726, at 1115 (2d Ed. 1983) . . . . . 13

*No.*

# In The

# Supreme Court of the United States

## October Term, 1986

---

**BRUCE LIPPO, d/b/a**
**"WALDEN - WOODFIELD SERVICE STATION",**
*Petitioner,*

v.

**MOBIL OIL CORPORATION,**
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

Petitioner, BRUCE LIPPO, prays that a writ of certiorari issue to review the Opinion and Judgment of the Seventh Circuit Court of Appeals entered October 7, 1986.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 802 F.2d 975, and is set forth commencing at page 1a of the Appendix hereto. The order of the United States Court of Appeals for the Seventh Circuit dated November 14, 1986 denying the Plaintiff's

Petition for Rehearing is set forth commencing at page 11a of the Appendix hereto. The unpublished District Court Memorandum Opinions dated November 22, 1983 and September 11, 1985, respectively, are set forth at page 12a and 25a of the Appendix hereto.

## JURISDICTION

Judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 7, 1986, and its order denying the Plaintiff's Petition for Rehearing was entered November 14, 1986, and this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 101 through 105 of the Petroleum Marketing Practices Act ("PMPA") (15 U.S.C. §2801 *et seg.)*. Pertinent parts of the statute are set out hereinafter.

The application of Federal Rules of Civil Procedure 56 is involved.

## STATEMENT OF THE CASE

This action arises out of the non-renewal of Plaintiff's gasoline service station franchise. Congress enacted the PMPA in an effort to protect franchisees from arbitrary or discriminatory termination or non-renewal of their franchises. S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, reprinted in (1978) U.S. Code Cong. & Adm. News 873, 874 ("Legislative History").

The PMPA prohibits termination of any franchise or non-renewal of any franchise relationship except on the basis of specifically enumerated grounds, and upon compliance with certain notification requirements. 15 U.S.C. Sec. 2801, *et seq.*

MOBIL'S grounds were predicated upon Sec. 2802 (b) (3) (A) which states:

> (b) (3) For purposes of this subsection, the following are grounds for non-renewal of a franchise relationship:
>
> (A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if - -
>
> (i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and
>
> (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

15 U.S.C. §2802 (b) (3) (A).

On March 26, 1982, Defendant sent LIPPO a Notice of Non-Renewal when he would not accept MOBIL's renewal proposal which increased his minimum rent from $1,368 per month to $2,892 per month and more than doubled the quantity of gasoline which he was required to sell.

Plaintiff had been a MOBIL franchise since 1974. On or about March 1, 1979, prior to any conflicts, the parties entered into their last franchise agreement for the operation of the Walden-Woodfield Service Station. Plaintiff's rent was based on 1,225,000 gallons per year, with a price margin of 6.27 cents per gallon. Between the execution of the 1979 Franchise Agreement and the presentation of the renewal proposal on March 17, 1982, MOBIL implemented a new program for preparing retail dealer contracts. Under the new program, a dealer's rent was determined by the sum of two components, "Gasoline Profit Center" ("GPC") and "Alternative Profit Center" ("APC"). GPC includes profit from the sale of gasoline; APC includes profit from repairs and sales of items other than gasoline. Under this new rent program, as originally formulated in 1980, the GPC component was to have been determined by applying the following formula:

(1) The Department of Energy (DOE) Base Period

Volume the dealer from November 1, 1977 through October 31, 1978, is ascertained.

(2) The dealer's actual gasoline sales for 1980 are determined.

(3) The larger of 1) or 2) is used as the "normal" volume for the dealer.

(4) MOBIL then determines a projected gasoline profit margin based on present margins, personal observation, experience, and good business judgment.

(5) The figure determined in 4) is multiplied by that determined in 3) to arrive at the dealer's projected gross profit from the sale of gasoline.

(6) The projected gross profit number is then "plugged into" a standard GPC Rent Schedule to determine the annual rental.

The Emergency Petroleum Allocation Act of 1973 was eliminated on January 28, 1981 and, thereafter, gasoline became more difficult to sell. On April 13, 1981, MOBIL amended its rent program allowing volume adjustments from steps 1), 2) and 3), to more accurately reflect a station's post-allocation potential. Defendant's interoffice communication advised that a Contract (gasoline) Volume Adjustment Request form ("GVA form"), presented to the dealer with the renewal proposal, be used in every case.

MOBIL's last amendment to the rent program was on March 8, 1982. Between April 13, 1981 and March 8, 1982, six dealers received volume adjustments. The extent of an adjustment, was determined by consulting the past history of a service station including competitors' yearly volumes and past maximums. On January 11, 1982, Chowdhury, the marketing representative who prepared Plaintiff's renewal proposal, conducted a trade area survey to determine LIPPO's actual price margins were 5 to 8 cents per gallon higher than his competitors on the various grades of gasoline. LIPPO's had independently raised his price and lowered his volume to about 360,000 gallons per year. At the proposed gallonage assigned to

LIPPO, the trade area showed that a price margin of 7.72 cents per gallon would have met MOBIL's competitiveness and compatibility criteria. According to MOBIL's District manager, the assigned price margin should be competitive and compatible with the projected sales volume. MOBIL assigned LIPPO a price margin of 10.22 cents per gallon.

LIPPO'S proposed price margin was compatible with an average volume station. The 10.22 cents per gallon margin was within the range (10.0-10.6 cents) of those dealers whose sales volume ranged from 400,000 to 680,000 gallons per year. The average volume Chicago area Mobil service station was 580,000 gallons per year. Like LIPPO, whose sales volume was set at 1,284,000 gallons per year, only one other dealer in the district was assigned a volume in excess of one million gallons per year. That station was the Fredenhagen franchise.

Fredenhagen and LIPPO were similar in the following respects: both sustained decreasing sales volumes in 1981 and 1982; their new contractual volume figures, on which their respective rents were based, were 1,275,000 and 1,284,000 gallons; Fredenhagen was required to increase sales for 1983 by more than 500,000 gallons per year to meet his contractual maximum; LIPPO by more than 700,000 gallons. Fredenhagen's rent was based on a 7.0 cents per gallon price margin; LIPPO's rent was based on 10.22 cents per gallon.

MOBIL stated that Fredenhagen's lower profit margin rate was based upon the following: (1) Fredenhagen was a new dealer; (2) the service station premises was under construction; (3) he had a trial franchise for a one-year period only; and (4) the station was being converted from a partial self-service to a full self-service operation, Upon deposition of C.A. Myers, MOBIL'S affiant, the first three points were refuted by admissions that (1) the fact that Fredenhagen was a new dealer had no effect on his price margin, (2) the conversion of Fredenhagen's station

from partial to full self-service had no effect on price margin since any loss resulting from a shut-down during construction would result in a rent rebate during such periods in accordance with MOBIL's normal procedure, and (3) Fredenhagen's one year trial franchise had no effect on his price margin. (Appendix, 35a). The last factor, that of differences in station configuration, was directly rebutted by the written guideline for MOBIL's rent program which states that station configuration should not be a basis for differences in rent. (Appendix, 41a, item 4). This factual dispute over whether Fredenhagen was similarly situated and thus probative of arbitrary and discriminatory action, was resolved by the Courts below.

MOBIL's renewal procedure required that the renewal proposal be presented to the dealer for his review and approval prior to approval by the district manager before typing. Chowdhury completed preparation of LIPPO's renewal proposal on February 2, 1982 but returned it directly to the district office. The district office analyst in charge of LIPPO's contract, brought the fact that LIPPO's signature was missing to the attention of her supervisors prior to the approval of District Manager of February 9, 1982. LIPPO was not informed of the terms of the 1982 franchise proposal until he was presented with a typed-up contract to either accept or reject on March 17, 1982. On March 26, 1982 MOBIL sent LIPPO the Notice of Non-Renewal.

Plaintiff brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, alleging claims for breach of contract and for violation of the PMPA. Defendant moved for summary judgment, which was partially granted on November 22, 1983. Plaintiff's Motion for Reconsideration and Defendant's renewed Motion for Summary Judgment resulted in a second Memorandum Opinion dated September 11, 1985 granting Defendant's Summary Judgment Motion and dismissing the case. Plaintiff appealed that the District Court had miscontrued

the PMPA, weighed evidence and resolved factual disputes. The United States Court of Appeals for the Seventh Circuit affirmed on October 7, 1986 and denied Plaintiff's Petition for Rehearing on November 14, 1986.

Plaintiff's evidence further showed that conflict existed between the parties as early as 1980, ripening into litigation to stop the Defendant's first attempt at terminating Plaintiff's franchise. That litigation was determined in Plaintiff's favor and is reported at 776 F.2d 706 (7th Cir. 1985). Despite the entry of Preliminary and Permanent Injunctions in that case, the Defendant delayed making necessary service station repairs, particularly from October, 1981 through February, 1982, leaving the Plaintiff with frozen pipes and without a heating system; again Defendant threatened to terminate the franchise spuriously asserting Plaintiff was in violation of his franchise agreement regarding insurance coverage; during 1981 and 1982 Defendant owned and operated a service station which competed with the Plaintiff and sold gasoline below Plaintiff's costs; and Defendant took no action on Plaintiff's two requests for approval of successor franchisees, thereby thwarting the Plaintiff's attempt to sell his interest in the equipment and "good will" of the station. Defendant violated its own renewal procedures by failing to present to Plaintiff a GVA form, which implicitly advised the dealer of MOBIL's April 13, 1981 amendment to its rent program – allowing volume adjustments to the rigidly mathematical existing formula, which, by implication, would have advised the dealer that the theretofore, non-negotiable, "take it or leave it" renewal proposal was now programmed for meaningful discussion and adjustments. Plaintiff's understanding that he had to accept the proposal "as is" or give up the station was not dispelled by any communication from MOBIL, but was reinforced by MOBIL's statement "that is the way it is" in response to his complaint that the new rent was too high.

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Effectively Negates the Protection Afforded Franchisees under the Petroleum Marketing Practices Act, Where the Franchisor Retaliates Against the Franchisee Forcing a Non-Renewal of the Relationship Through Arbitrary Contract Changes.

Congress enacted the PMPA in an effort to protect "franchisees from arbitrary or discriminatory termination or non-renewal of their franchises." (Legislative History p. 874).

As remedial legislation, the PMPA should be given a construction consistent with its overriding purpose to protect franchisees. *Brach v. Amoco Oil Co.*, 667 F.2d 1213 (7th Cir. 1982). The Court below misconstrued the statute when it embraced a rule of broad judicial restraint by refusing to review objective facts based on remarks of the Senate Committee which were taken out of context.

In response to Plaintiff's claim that the April 13, 1981 volume adjustment amendment was applied to other dealers but not to him, that he was not informed orally or by way of a GVA form that adjustments were being made available, that his station's historic records were ignored while MOBIL took into account the past history of other stations including their competitors' yearly volumes and past maximums, that other dealers had competitive price margins assigned to them that were compatible with the assigned sales volume, while LIPPO, with a sales volume of 1,284,000 gallons per annum was assigned an uncompetitive price margin compatible with an average volume (580,000 gallons per annum) station , the Court of Appeals stated:

> . . . this Court will not, indeed cannot, review the objective reasonableness of a franchisor's actions. We cannot second-guess the business decision of a franchisor to force a dealer to lower its prices. . .

(Appendix, 7a). A fuller excerpt from the Senate Report

reveals:

> One test is whether the determination was made "in good faith." This good faith test is meant to preclude sham determinations from being used as an artifice for termination or non-renewal. The second test is whether the determination was made "in the normal course of business". Under this test, the determination must have been the result of the franchisor's normal decision making process. These tests provide adequate protection of the franchisee from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the business judgment itself. Thus, it is not necessary for the Courts to determine whether a particular *marketing strategy*, such as market withdrawal, or the conversion of leased marketing premises to a use other than the sale or distribution of motor fuel, is a wise business decision.

(Legislative History p. 896)(Emphasis supplied).

While the Court may be circumscribed by Congressional intent from reviewing the wisdom of the business judgment made by the franchisor in creating a marketing strategy, i.e. MOBIL's rent program, no proscription limits the Court from making a necessary analysis to determine whether the rating given LIPPO was nothing more than a pretext for non-renewal. *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1390-1391 (10th Cir. 1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1716 (1982).

Here, the Plaintiff did not question MOBIL's business judgment in establishing its rent program. He did ask whether MOBIL selectively applied its rent program to discriminate against him.

Under the PMPA, the essence of improper conduct in franchise negotiations is selective application of a standard practice or discrimination against an individual dealer; the PMPA is violated when there is an indication that a franchisee was treated differently from other

franchisees when the franchisor sought to make changes in the franchisee's lease. *Bellmore v. Mobil Oil Corp.*, 524 F.Supp. 850 (D. Conn. 1981), *Pearman v. Texaco*, 480 F.Supp. 467 (W.D. Mo. 1979).

The good faith requirement would preclude the franchisor from basing non-renewal upon any failure to agree to changes or additions to the provisions of the franchise which are imposed in a discriminatory manner. (Legislative History at p. 893.)

*Brach v. Amoco Oil Co.*, 667 F.2d 1213 (7th Cir. 1982), adopted the "good faith" test established in *Munno v. Amoco Oil Co.*, 488 F.Supp. 1114, at 1118-21 (D.Conn. 1980).

*Munno* teaches:

1) that subjective good faith means "good heart" without evil intent;

2) that the presence of intent is rarely susceptible of direct proof, and must be established by legitimate inferences from circumstantial evidence;

3) that objective evidence, such as interoffice memos or evidence of prior disputes between the parties, could constitute circumstantial proof tending to show bad faith on the part of the franchisor; and

4) that where rent is not set pursuant to a cost analysis applied uniformly to all dealers, grossly unreasonable effects might be some circumstantial evidence of bad faith; while not suggesting that unreasonableness is the standard against which to test proposed changes to the lease, the Court observed that if the franchisor had given consideration to particular factors in determining the rent for other stations, but not Plaintiff's, it might be some evidence that the rental changes were not requested in good faith in the normal course of business. (Citing *Pearman v. Texaco*, 480 F.Supp. 467 (W.D. Mo. 1979)).

*Munno v. Amoco Oil Co., supra*, arose out of the application by Amoco of an objectively applied rent formula

based on accounting records of yearly rents and actual expenses. MOBIL's rent program was scrutinized and compared to the *Munno* formula in *Bellmore v. Mobil Oil Corporation, supra.* The Court noted at page 853 that although MOBIL's marketing strategy was applied to the franchisees throughout the country, the formula calls for MOBIL to evaluate certain historic data, projected sales volumes and comparative sales figures among other information, factors which are not determined simply from objective evidence but instead called for some independent judgments. The formula, the Court went on to say, is not as blind to the individual characteristics of a franchisee as is one based on accounting records, yearly rents and actual expenses as was the case in *Munno v. Amoco.* Reviewing *Munno*, the *Bellmore* court observed that there was no question that Amoco's formula was being applied uniformly nor was it possible because of the nature of Amoco's formula, to use it to discriminate in favor of or against any given franchisee in figuring his rent.

Like *Bellmore*, here, MOBIL admittedly used historic data and comparative sales figures in its rent calculations for other dealers. Unlike *Bellmore*, there is evidence that MOBIL's estimates as to LIPPO were reached in a manner different than for other franchisees.

The broad brush of the Court of Appeals turns the PMPA from a franchisee's shield into a sword for the franchisor. The result is foreboding and pervasive as it cuts at the core of franchisees' protections, even undermining pre-PMPA decisions of this Court. See *Simpson v. Union Oil Co.*, 377 U.S. 13 (1963). The loophole created by the Court below can only be closed by a decision of this Court interpreting the PMPA consistent with is overriding purpose. Franchisees cannot be protected if the Courts are not permitted the analysis necessary to determine whether the franchisee's position *vis-a-vis* other dealers is selective and discriminatory, and nothing more than a pretext for non-renewal. Accord, *Thompson v. Kerr-McGee Refining*

*Corp., supra.* Only a decision by this Court on the question presented can bring finality and fairness to this case and the rights of other petroleum franchisees.

**2. The Decision Below is Not In Accordance With Applicable Decisions Of This Court Because It Ignores The Standards Appropriate For Summary Judgment In The State of Mind And Creditability Context.**

The PMPA places the burden of proving good faith on the non-renewing franchisor. 15 U.S.C. §2805(c). The franchisor also has the burden to show that the failure was not technical or unimportant to the franchise relationship, or for cause beyond the reasonable control of the franchisee. 15 U.S.C. §2801(13).

MOBIL is the movant and the burdened party, and MOBIL's intent is in issue.

When MOBIL treated LIPPO differently from the way it treated other dealers, the objective fact of that selective treatment is circumstantial evidence of MOBIL's lack of good faith.

> The good faith requirement would preclude the franchisor from basing nonrenewal upon any failure to agree to changes or additions to the provisions of the franchise which are imposed in a discriminatory manner.

(Legislative History at 893).

In reviewing a summary judgment, an Appellate Court must consider the entire record. If the record reveals that inferences contrary to those drawn by the trial court might be permissible, then summary judgment should be reversed. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). When the issues of motive or intent are at stake, summary judgment is proper only where the Plaintiff presents no indication of motive and intent supportive of his position. *First Nat. Bank v. Cities Service Co.*, 391 U.S. 253 (1968).

Plaintiff introduced the disparate treatment between

LIPPO and Fredenhagen as evidence of discriminatory intent. On this fact issue the Court of Appeals weighed the evidence and found MOBIL's explanation for the difference *plausible*. The proper question was not whether MOBIL's explanation is plausible, but whether LIPPO's explanation is plausible. MOBIL's evidence to support distinguishing Fredenhagen from LIPPO was based on the affidavits of MOBIL's Assistant Manager, Charles Myers.[1] Myers admitted during his deposition, however, that the first three factors suggested as a basis for distinguishing the two franchisees did not affect the price margin established for Fredenhagen. Additionally, Myers' last factor, that of differences in station configuration, is in conflict with MOBIL's written rent program, which states that station configuration should not be a basis for differences in rent. Since the creditability of the movant's witness was challenged and specific bases for possible impeachment was shown, summary judgment should be denied. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2D §2726, at 1115 (2d Ed. 1983).

> The Court of Appeals noted that
>
> there certainly appears to be a difference of opinion between the parties over the relative importance of station configuration . . .

(Appendix, 8a, note 1), and thereafter, drew its own conclusion. A reviewing Court's duty is not to weigh the evidence, but to construe all evidence and inferences therefrom in light most favorable to the party opposing the motion. *United States v. Diebold, Inc., supra.* Clearly, the inferences that can be drawn from Plaintiff's evidence coupled with the challenged testimony of MOBIL's affiant require resolution by a fact finding

---

[1] The movant's affidavits can be characterized as interest testimony, all offered by Defendant's employees, raising a question of creditability for the jury. *Startor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

jury. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

LIPPO's rent was not set pursuant to an objective cost analysis. The fact that LIPPO's GPC rent increased from $768 per month to $2163 per month under the proposed renewal agreement might be some further circumstantial evidence of MOBIL's intent. See *Thompson v. Kerr-McGee Refining Corp., supra.* and *Munno v. Amoco Oil Co., supra.* Other evidence tending to show MOBIL's bad faith is the prior disputes between the parties which culminated in prior litigation. *Thompson v. McGee Refining Corp., supra.*, at 1391. Viewing these facts, contradictions and inference in the light most favorable to the Plaintiff, a genuine issue as to MOBIL's intent remains and should be resolved at trial.

Plaintiff's other evidence was not presented to challenge the "reasonableness" of MOBIL's business judgment, but was presented as additional circumstantial evidence of MOBIL'S discriminatory intent in selectively applying a standard practice. MOBIL's standard practice was to present a worksheet used in its contract preparations (the GVA form) to every dealer but MOBIL failed to present it to LIPPO; MOBIL never informed LIPPO that the April 13, 1981 amendment to its rent program permitted adjustments to the assigned volume yet at least 6 other dealers were informed and adjustments made; and that MOBIL delayed presenting to LIPPO the terms of the renewal proposal from February 9th until March 17th, whereas other dealers were presented with their contract terms prior to final approval by the district manager.

MOBIL admittedly established other dealers' price margins so as not to put them at a competitive disadvantage. Below, the Court overlooked the Plaintiff's evidence of the trade area survey prepared by the same MOBIL employee who prepared LIPPO's renewal agreement, to show that the assigned price margin made LIPPO

uncompetitive in his trade area. Rather than construing this evidence and the inferences in light most favorable to LIPPO and determining whether intent was indicated, the Court weighed the evidence and drew its own conclusion. The Court of Appeals found:

> The figures used were projections based on MOBIL's business judgment as well as historical data of the stations profitability.

(Appendix 7a).

Judge Blumenfeld's reasoned opinion in *Munno* on the issue of subjective good faith states that in cases such as this where the rent is not set pursuant to a cost analysis applied uniformly to all dealers, the fact that the franchisor had given consideration to particular factors in determining the rent for other stations, but not Plaintiff's, may be some evidence that the rental changes were not made in good faith in the normal course of business. *Munno v. Amoco Oil Co., supra.*, at 1119. Moreover, the Court below overlooked the historical data of the station which showed that the price margin for WALDEN-WOODFIELD was 6.27 cents per gallon at comparable gallonage. LIPPO's burden was to raise some inferences indicating motive or intent supportive of his position. At trial, he will have to persuade the jury.

Evidence of intent can also be inferred from MOBIL's admission that LIPPO was considered to be a problem dealer and that in like circumstances, MOBIL would not be motivated to reward a dealer for his independent pricing policy which drove business away.

The Court of Appeals acknowledged that different inferences could be drawn from the relevant facts.

> On appeal, both parties allege that their adversary misrepresented the pertinent facts. We find no such misrepresentation, but rather that the parties disagree on the inferences to be drawn from the relevant facts.

(Appendix, 4a).

When reasonable minds can draw different inferences and reach different conclusions from the facts, the issues must be reserved for trial. If the record reveals that inferences contrary to those drawn by the court below might be permissible, then summary judgment should be reversed. The Defendant who bears the burden of proof, as MOBIL did here, must show that there is an absence of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

Moreover, the creditability issue established by inconsistencies in testimony is also a sufficient basis for which this matter should proceed to trial. The question of creditability alone can be an issue of material fact sufficient to defeat a motion for summary judgment when the movant is the burdened party. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 664 S.Ct. 724 (1944).

The opinion rendered by the Court below patently reveals the misapplication of the summary judgment procedure. All evidence and inferences therefrom were not construed in light most favorable to the party opposing the motion. The Plaintiff should be, under the evidence presented, guaranteed his constitutional right to trial by jury. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of "even handed justice". *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962).

In the context of non-renewals under the PMPA, issues of creditability and state of mind require the strict application of the summary judgment principles enunciated by this Court, since, even with liberal discovery, the evidence garnered can at best be circumstantial or conflicting, and, weighing and resolving this evidence is the duty and function of a fact finding jury.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVIS CHIN*
105 West Madison Street
Chicago, Illinois 60602

MICHAEL R. MCKENNA
25 East Washington Street
Chicago, Illinois 60602
(312) 372-7777

*Attorneys for Petitioner*

Date: January 9, 1987
*Counsel of Record

# APPENDIX

In the

# United States Court of Appeals

## For the Seventh Circuit

---

No. 85-2770

BRUCE LIPPO, d/b/a "WALDEN-WOODFIELD SERVICE STATION",

*Plaintiff-Appellant,*

*v.*

MOBIL OIL CORPORATION,

*Defendant-Appellee.*

---

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 3966—**Prentice H. Marshall**, *Judge.*

---

ARGUED MAY 28, 1986—DECIDED OCTOBER 7, 1986

---

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

FLAUM, *Circuit Judge.* For approximately nine years plaintiff-appellant Bruce Lippo (Lippo) operated a gasoline service station in Schaumburg, Illinois, as a franchisee of the defendant-appellee Mobil Oil Corporation (Mobil). This case arises from the parties' failure to renew the franchise agreement upon the expiration of its term. From October 1, 1979 through September 30, 1982 the franchise relationship between Lippo and Mobil was governed by a contract, a service station lease, and several other documents executed on March 1, 1979, as well as the Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978), codified at 15 U.S.C. §§ 2801-2841 (PMPA or "the

Act") which became effective upon enactment on June 19, 1978. During March 1982, Mobil presented Lippo with proposed franchise documents for a three-year term beginning October 1, 1982. The key element for purposes of this action was the proposed rental amount. Lippo did not execute the proposed documents. On March 26, 1982, Mobil sent Lippo a notice of nonrenewal.

Lippo commenced this action alleging that the nonrenewal violated the contract and the PMPA. Summary judgment was granted in favor of Mobil. Lippo has appealed, contending that Mobil's refusal to renew the franchise agreement violated the PMPA. For the reasons set forth below, we see no error in the district court's rulings and therefore affirm.

According to the contract and supporting documents, Mobil had the unconditional right not to renew the franchise. However, the PMPA, which must be read into the contract and lease, was enacted to protect petroleum franchisees from overbearing and discriminatory termination practices by franchisors. *See, e.g., Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220 (7th Cir. 1982).

The relevant portion of the Act provides:

> (b)(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:
>
> (A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if:
>
> (i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and
>
> (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

15 U.S.C. § 2802(b)(3)(A).

In a civil action under the PMPA, the parties' burdens are clearly delineated. The franchisee has the burden of demonstrating: (1) the existence of a franchise relationship; (2) his status as a franchisee; and (3) the nonrenewal of the franchise relationship by the franchisor. Then, "[t]he franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such . . . nonrenewal was [permissible] under section 2802(b). . . ." 15 U.S.C. § 2805(c). *See* H.R. Rep. No. 95-297, 95th Cong., 2d Sess. 41, *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 899. The focus in this case is whether Mobil's proposed changes to the franchise agreement were made in good faith, in the normal course of business, and not as a pretext for nonrenewal. *See, e.g., Munno v. Amoco Oil Co.*, 488 F. Supp. 1114 (D. Conn. 1980). The franchisor's obligation to deal in good faith has been recognized as a subjective one:

> [I]t is appropriate to note that considerable debate has focused upon recognition of so-called "reasonable business judgments" of the franchisor as grounds for termination or non-renewal. This standard has not been adopted by the committee. Instead, a two-fold test has been utilized to judge certain specified determinations. . . .
>
> One test is whether the determination was made "in good faith." This good faith test is meant to preclude sham determinations from being used as an artifice for termination or non-renewal. The second test is whether the determination was made "in the normal course of business." Under this test, the determination must have been the result of the franchisor's normal decisionmaking process. These tests provide adequate protection of franchisees from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the business judgment itself.

Senate Report No. 95-731, 95th Cong. 2d Sess. 37, *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 895-96. *See also Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1222 (7th Cir. 1982); *Siecko v. Amerada Hess Corp.*, 569 F.

Supp. 768, 771-72 (E.D. Penn. 1982); *Palmieri v. Mobil Oil Corp.*, 529 F. Supp. 506, 511-12 (D. Conn.), *aff'd*, 682 F.2d 295 (2d Cir. 1982); *Bellmore v. Mobil Oil Corp.*, 524 F. Supp. 850, 853 (D. Conn. 1981); *Munno v. Amoco Oil Co.*, 488 F. Supp. 1114, 1118-21 (D. Conn. 1980).

On appeal, both parties allege that their adversary misrepresented the pertinent facts. We find no such misrepresentation, but rather that the parties disagree on the inferences to be drawn from the relevant facts. Summary judgment should not be substituted for a trial on the merits. Instead, summary judgment is proper and will be upheld on appeal when the pleadings and supporting papers in the record demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant for summary judgment bears the burden of establishing the absence of a genuine issue of material fact and the entitlement to judgment as a matter of law. *E.g., Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984). All doubts are to be resolved against the movant. The non-moving party's reasonable allegations are to be accepted as true for purposes of summary judgment. *E.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Based on the foregoing standard, the following facts are apparent from the record.

In early March, 1982 an Area Manager (Boyer) and a Marketing Representative (Chowdhury) of Mobil met with Lippo to explain the proposed terms of a new franchise agreement between Mobil and Lippo. However, the final copies of the documents were not reviewed at that time. On March 17, 1982 Boyer and a different Marketing Representative (Perry) brought the documents pertaining to the franchise renewal to Lippo at his service station and a meeting was arranged for March 24, 1982 to obtain the executed copies of the agreement from Lippo. Boyer later contacted Lippo to request an earlier meeting date, but Lippo advised that his attorneys had the documents and no meeting could be held until the following week. Boyer then advised Lippo that it was imperative to meet the

week of March 22, 1982 as Mobil, pursuant to the requirements of the franchise documents and the PMPA, 15 U.S.C. § 2804(b)(2), was required to give notice of nonrenewal to Lippo 180 days prior to the expiration of the current agreement if they could not agree on new terms. Mobil sent such a notice of nonrenewal to Lippo on March 26, 1982 citing the parties' inability to reach agreement on the terms of the renewal documents, particularly the rent requirement. No meeting was apparently held to discuss the final franchise agreement documents although Mobil stated its willingness to continue to discuss the proposed agreement in the nonrenewal notice.

Lippo filed this suit on June 24, 1982 challenging Mobil's failure to renew the franchise agreement and seeking injunctive and declaratory relief as well as compensatory and punitive damages. In two orders resolving the numerous issues presented, the district court granted summary judgment in favor of Mobil. Lippo contends that the proposed changes were not formulated in good faith in the normal course of business, but rather were a pretext for nonrenewal. He further asserts that the failure to agree on the new franchise provisions was caused by Mobil's lack of good faith and its discriminatory treatment of him in violation of the PMPA. In support of these allegations, Lippo challenges (1) certain components of the station rent calculation, namely, the gasoline profit center (GPC) profit margin and gasoline volume; and (2) the conduct of Mobil during the renewal period.

*RENT CALCULATION*

The major dispute between Lippo and Mobil involved the annual rent requirement in the proposed contract; particularly the GPC component. GPC includes profits from the sale of gasoline and is derived using the following formula:

1) The Department of Energy (DOE) Base Period Volume for the dealer from November 1, 1977 through October 31, 1978 is ascertained.

2) The dealer's actual gasoline sales for 1980 are determined.

3) The larger of 1) or 2) is used as the "normal" volume for the dealer.

4) Mobil then determines a projected gasoline profit margin based on present margins, personal observation, experience, and good business judgment.

5) The figure determined in 4) is multiplied by that determined in 3) to arrive at the dealer's projected gross profit from the sale of gasoline.

6) The projected gross profit number is then "plugged into" a standard GPC Rent Schedule to determine the annual rental.

The GPC component of his annual rent was calculated by Marketing Representative Chowdhury. Lippo's DOE base period volume was 1,283,725 gallons and his 1980 sales volume was 1,079,563 gallons. Under the Mobil formula, then, the DOE figure was used. Lippo's projected profit margin for the GPC was determined to be 10.22 cents per gallon. The projected profit margin was formulated based on "present margins, personal observation, experience, and good business judgment." The district court noted that the projected margin figure was slightly lower than Lippo's actual margins. Multiplying the projected profit margin by Lippo's DOE volume yielded a gross profit figure of $131,205. Based on Mobil's standard GPC Rent Schedule, this was converted to an annual rent of $25,963, or $2,163 per month. Because the increase was incrementally applied, Lippo's GPC rent would be $1,937 per month in the first year and thereafter would be the full amount of $2,163 per month.

*GPC PROFIT MARGIN*

Lippo claimed that Mobil determined his projected GPC profit margin in a discriminatory fashion, not as a result of its normal decisionmaking, in violation of the PMPA. Particularly, he asserts on appeal that Mobil failed to

adhere to its own policy that the assigned profit margin should be competitive and compatible with projected sales volume. He identifies an allegedly similarly situated Mobil dealer (Fredenhagen) with an assigned GPC profit margin of 7.0 in support of his claim of discriminatory treatment.

Lippo complains, as he did in the district court, that Mobil's projection of a high sales volume and a profit margin of 10.22 cents per gallon to calculate GPC rent ignores the relationship between price and volume. He asserts that he cannot sell the projected volume of gasoline at the stated profit margin. Thus, he contends that Mobil's projected profit margin determination was not based on the exercise of good business judgment. Further, he argues that Mobil ignored its own policy by computing a GPC profit margin which was not competitive and incompatible with the projected volume.

As we have previously stated, this Court will not, indeed cannot, review the objective reasonableness of a franchisor's actions. We cannot second-guess the business decision of a franchisor to force a dealer to lower its prices (which is what Lippo argues he must do to meet the projected sales volume). Moreover, so long as the proposed charge is not being used to disguise an illegal attempt to discriminate against a franchisee and drive him from business, the court has no power to interfere. "If . . . a good faith application of a rental formula operates unreasonably in a particular case, the dictates of the marketplace alone will govern the transaction." *Munno*, 488 F. Supp. at 1119. The figures used were projections based on Mobil's business judgment as well as historical data of the station's profitability. Lippo has failed to persuade us that his assigned profit margin figure was incompatible and uncompetitive vis-a-vis the volume figure.

Lippo also claims he was treated differently from a similarly situated dealer in the Chicago area, Fredenhagen. Lippo compares his 1981 volume of 511,694 gallons to Fredenhagen's projected volume of 575,000 gallons during his first year of operation. He also compares his 10.22

cents per gallon GPC profit margin with Fredenhagen's projected 7.0 cents per gallon GPC profit margin. We agree with the district court's conclusion, however, that Lippo and Fredenhagen were not similarly situated. Mobil stated that Fredenhagen's lower profit margin rate was based upon the following facts: (1) Fredenhagen was a new dealer; (2) the service station premises were under construction; (3) he held a trial franchise for a one-year period only; and (4) the station was being converted from a partial self-serve operation to a full self-serve operation. Lippo had a partial self-service station which, according to Mobil, has generally higher profit margins than full self-service stations. We reiterate that the margin is Mobil's projection of a station's profitability and Mobil's explanation for the difference is plausible. Lippo does not persuade us otherwise. Indeed, Lippo's assigned profit margin was within the range for others with partial self-serve operations. The projected profit margin was also below Lippo's actual margin at the time the projection was made. Thus, Fredenhagen's dissimilar treatment does not constitute evidence of discriminatory treatment actionable under the PMPA. We hold therefore that Lippo's projected profit margin was calculated in good faith and in the normal course of Mobil's decisionmaking.[1]

*GASOLINE SALES VOLUME*

Lippo next contends that Mobil failed to apply two programs which would have affected his GPC rent. Initially, he asserts Mobil failed to present a worksheet used in its contract preparations (the Contract Gasoline Volume Adjustment Request) to Lippo to inform him of the pos-

[1] We view with disfavor Lippo's numerous allegations of misrepresentation by Mobil during this litigation. There certainly appears to be a difference of opinion between the parties over the relative importance of station configuration in the projections, but we have found no evidence that Mobil misled the court. Indeed, Lippo asserts Mobil made misrepresentations on three factual issues but describes only two in his brief.

sibility of rent adjustments and meaningful negotiations. This argument is meritless. While the PMPA precludes discriminatory and arbitrary treatment by franchisors, a franchisee must take some action to protect his rights. Lippo does not contend he initiated any dialogue or negotiation even though the rent formula was entirely new. He apparently did not even inquire about the calculations. Mobil is only obliged to act in a nondiscriminatory manner, not to put its dealers' interests ahead of its own.

Lippo also contends Mobil improperly failed to apply an amendment ("March 8th Amendment") for computing normal volume to him. The formula applied to Lippo defined the maximum contract volume as the higher of the DOE defined base period volume or the 1980 calendar year volume. Mobil changed this determination on March 8, 1982:

> *Maximum*: The maximum will be normal volume which is defined as the realistic potential of the location operating under normal marketing conditions. The realistic potential would be the best projection for the location assuming a competitive pricing posture and applying the other retail factors such as hours, service and appearance in a reasonable manner.

Plaintiff asserts that defendant discriminated against him by failing to apply the new, more favorable formula in determining his future rental amount. Mobil's response is that (1) the new formula was not applied retroactively; (2) the time pressure made it impossible to apply the new "normal volume" formula; and (3) the rent under the new formula would have been the same.

The record contains evidence that Lippo's contract renewal package was prepared and discussed with him prior to March 8, 1982. Lippo has offered no evidence to show that he was treated differently from other dealers whose contract renewal documents were prepared prior to March 8, 1982 nor to rebut Mobil's assertion that it routinely applied amendments to its nationwide rental policy prospectively only. The "normal volume" computed for Lippo's successor in October, 1982 was also identical to the figure

used in Lippo's renewal documents. Moreover, Lippo made no showing that application of the March 8th Amendment would have affected his GPC rent and thus led to a renewal agreement with Mobil.

*MOBIL'S CONDUCT*

Lippo's final assertion is that Mobil's conduct during the renewal period is circumstantial evidence of its discriminatory intent. He specifically cites Mobil's delay in presenting the renewal documents to him and its failure to advise him in writing that a unilateral rent adjustment program would be applicable to him on renewal. This conduct does not support Lippo's claim of discrimination. Lippo made no apparent effort to negotiate when presented with the renewal documents, taking the position instead that Mobil must continue the franchise agreement under the 1979 terms if no other agreement could be reached. Further, the rent adjustment program was initiated in April 1981 as a temporary measure and cancellable by Mobil at any time. We have found no evidence that Mobil engaged in a campaign to harass Lippo in order to force him out of business in retaliation for his "independent retail pricing policy."

AFFIRMED.

A true Copy:

Teste:

---

*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA 79004—Midwest Law Printing Co., Inc., Chicago—10-7-86—450

# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 14, 1986

**Before**

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

BRUCE LIPPO, d/b/a "WALDEN-WOODFIELD SERVICE STATION",
*Plaintiff-Appellant,*

No. 85-2770

*v.*

MOBIL OIL CORPORATION,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 82 C 3866

Honorable Prentice H. Marshall, Judge Presiding.

## ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**BRUCE LIPPO d/b/a Walden-Woodfield Service Station,**
*Plaintiff,*

*v.*

**MOBIL OIL CORPORATION,**
*Defendant.*

No. 82 C 3966

## MEMORANDUM OPINION

Prentice H. Marshall, District Judge

Plaintiff Bruce Lippo operated a Mobil service station in Schaumberg, Illinois called "Walden-Woodfield Service Station" pursuant to a franchise relationship with defendant Mobil Oil Corporation ("Mobil"). The relationship was governed by a contract, service station lease, and several other documents, all dated March 1, 1979. The initial term of both the contract and lease was from October 1, 1979 through September 30, 1982. On March 25, 1982, Mobil sent Lippo a notice of nonrenewal. This case arises out of that action. Now pending are cross motions for summary judgment.

The complaint contains two counts. In count 1 plaintiff alleges that the nonrenewal violated the contract. In count 2 plaintiff alleges that the nonrenewal violated the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801-06 (Supp. IV 1980). Plaintiff asks for declaratory relief and an award of damages.[1] Defendant

---

[1] An injunctive relief claim contained in the complaint is now moot as plaintiff no longer occupies the service station. *See* Memorandum in Response to Mobil Oil Corporation's Motion for Summary Judgment at 2.

has counterclaimed for a declaratory judgment of non-breach and non-violation of the PMPA. We have jurisdiction under 15 U.S.C. §2805(a) (Supp. IV 1980) and 28 U.S.C. §1332(a) (1976).

A rider to the contract provided as follows:

> Term. The term of this contract shall be for an original period of Three (3) year (s) beginning October 1, 1979 and ending September 30, 1982 and for successive similar renewal periods thereafter, provided that it shall terminate at the end of any current period (original or renewal) by notice from either party to the other, given not less than 180 days prior to such termination, and provided further that if the premises are leased or subleased to Buyer by Seller, this contract, notwithstanding its term, may be terminated by Buyer at any time on not less than 90 days' notice to Seller.

The lease contained a similar term. The notice here met the 180 day requirement of both the contract and lease. Despite plaintiff's objections to the contrary, under the terms of the contract and lease as written, there was nothing improper about the notice of termination. The quoted provisions of the contract and the similar provisions of the lease do not in any way condition Mobil's right not to renew plaintiff's franchise. Under the contract itself, Mobil could refuse to renew for any reason or for no reason.

However, Mobil concedes that the PMPA, which became effective on June 19, 1978, is to be read into the contract and lease. [Mobil's] Reply to Plaintiff's Memorandum at 14. Thus, if the nonrenewal violated the PMPA it was a breach of the contract too. The operative provision of the PMPA states:

> (3) [T]he following are grounds for non-renewal of a franchise relationship:
>
> (A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if - -

> (i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and
>
> (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

15 U.S.C. §2802 (b) (3) (A) (Supp. IV 1980).

We begin with the circumstances surrounding plaintiff's nonrenewal. Mobil apparently determined at some time in early 1982 or before that it wished to propose changes in several of the terms of Lippo's franchise if the franchise relationship were to continue beyond September 1982. It therefore developed a new proposed contract for Lippo. The key element of the proposed contract, as far as this lawsuit is concerned, was the proposed rental amount. The proposed rent was determined based on calculations made by Mobil marketing representative Abu Chowdhury on January 30, 1982. Chowdhury Affidavit, Ex. A (dated January 30, 1982). These calculations were then reviewed by Chowdhury's superior Tracy Boyer. *Id.* ¶13.

On March 2, 1982, Mobil's then area manager for Lippo's area, William F. Boyer, met with Lippo and Chowdhury to explain to Lippo the terms of the proposed contract. Boyer Affidavit ¶¶2, 4. The Mobil representatives did not have final copies of the contract documents at that time. *Id.* ¶4. Boyer returned to Lippo's station on March 17, 1982 with Allen Perry, another Mobil employee, bringing with him the final "package" of contract documents. Boyer left the package with Lippo. *Id.* ¶5. Lippo did not respond immediately to the proposal, and Mobil therefore sent him the required 180 day notice of nonrenewal on March 25, 1982. Lippo received the notice on March 28, 1982.

Lippo's allegations center around the annual rent provided for in the proposed contract. A Mobil dealer's rent is determined by the sum of two components,

"gasoline profit center" ("GPC") and "alternate profit center" ("APC"). GPC includes profits from the sale of gasoline; APC includes profits from repairs and sales of items other than gasoline. Affidavit of Thomas J. Kehoe ¶6. In Lippo's case, the GPC component was determined by applying the following formula:

1) The Department of Energy ("DOE") Base Period Volume for the dealer from November 1, 1977 through October 31, 1978 is ascertained. (We assume this is based on the former DOE regulations concerning allocation of gasoline supplies).

2) The dealer's actual gasoline sales for 1980 are determined.

3) The larger of 1) or 2) is used as the "normal" volume for the dealer.

4) Mobil then determines a projected gasoline profit margin based on present margins, personal observation, experience, and good business judgment.

5) The figure determined in 4) is multiplied by that determined in 3) to arrive at the dealer's projected gross profit from the sale of gasoline.

6) The projected gross profit number is then "plugged into" a standard GPC Rent Schedule to determine the annual rental.

*Id.* ¶7. For leases proposed in 1982, the increase in rent over the previous rental was to be phased in in two equal increments, so that the dealer would pay the full GPC rental in the second year of the three year lease. *Id.* The APC component of the rent is determined by multiplying .20 by the projected gross profit on all nongasoline sales and service activities of the dealership. *Id.* ¶9.

These calculations were performed in Lippo's case by marketing representative Chowdhury. Chowdhury states in his affidavit that Lippo's DOE base period volume was 1,283,725 gallons and that his 1980 sales volume was 1,079,563 gallons. Thus, under the Mobil formula, the DOE figure was used. Chowdhury Affidavit ¶5. The next

figure determined by Chowdhury was Lippo's projected profit margin. *Id.* ¶7. This is reflected in Exhibit A to Chowhury's affidavit. Mobil has not informed us how the "projected volume" and "projected margin" figures on which the projected profit margin is based were determined in Lippo's case. Based on the formula described in Kehoe's affidavit, *supra*, they appear to have been determined based on "present margins, personal observation, experience, and good business judgment." We note from Exhibit A to Chowdhury's affidavit that the projected margins were somewhat lower than Lippo's actual margins at the time the survey was prepared. In any event, Lippo's projected profit margin for the GPC was determined to be 10.22¢ per gallon.

Multiplying the projected profit margin by Lippo's DOE volume yielded a gross profit figure of $131,205. Based on Mobil's standard rent schedule, this was converted to an annual rent of $25,963, or $2163 per month. Chowdhury Aff. ¶¶8-9 & Ex. B. Chowdhury states in his affidavit that the increase was to be phased in so that in the first year Lippo's GPC rent would be $1937 per month and thereafter would be the full amount of $2163 per month. *Id.* ¶9.

Lippo's APC rent component was calculated by determining a gross profit projection for non-gasoline items and then multiplying the projection by .20. The product was then added to an annual rental figure for Lippo's salesroom (we have not been informed how this was determined) to arrive at an annual APC rental of $11,459, or $955 per month.

Lippo takes aim at the GPC component of the proposed rent. He claims that several of Mobil's actions in determining his proposed GPC rent violated the PMPA. Lippo alleges that Mobil: 1) determined his projected GPC profit margin in a discriminatory fashion; 2) calculated his gasoline volume in a discriminatory fashion; 3) failed to

provide him with the standard incrementalization of the proposed rent increase; and 4) failed to apply a new, more favorable rental formula that Mobil implemented on March 8, 1982.[2]

The PMPA does not provide carte blanche for a court to examine the fairness or reasonableness of proposed contractual changes. Such a standard was specifically rejected by Congress:

> [I]t is appropriate to note that considerable debate has focused upon recognition of so-called "reasonable business judgments" of the franchisor as grounds for termination or non-renewal. This standard has not been adopted by the committee. Instead, a two-fold test has been utilized to judge certain specified determinations . . . .
>
> One test is whether the determination was made "in good faith." This good faith test is meant to preclude sham determinations from being used as an artifice for termination or non-renewal. The second test is whether the determination was made "in the normal course of business." Under this test, the determination must have been the result of the franchisor's normal decisionmaking process. These tests provide adequate protection of franchisess from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the business judgment itself.

Senate Report No. 95-731, 95th Cong. 2d Sess. 37, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 873,

---

[2] In his complaint, Lippo also attacked the minimum gasoline purchase requirement contained in the proposed contract and the elimination of a ten-day "cure" provision for defaults under the contract. Mobil's evidence establishes that the gasoline purchase requirement was based on a standard formula applied to all dealers. Kehoe Aff. ¶4. Plaintiff has not mentioned either of these claims in the context of the present motions and therefore we assume that he has dropped them.

895-96. The courts have uniformly held, therefore, that so long as proposed changes in the terms of the franchise are not applied selectively or discriminatorily and are not simply used as a pretext for nonrenewal, they will withstand scrutiny under the PMPA. *See, e.g., Brach* v. *Amoco Oil Co.*, 677 F. 2d 1213, 1222 (7th Cir. 1982); *Meyer* v. *Amerada Hess Corp.*, 541 F. Supp. 321, 330 (D. N.J. 1982); *Palmieri* v. *Mobil Oil Corp.*, 529 F. Supp. 506, 511-12 (D. Conn. 1982); *Baldauf* v. *Amoco Oil Co.*, 553 F. Supp. 408, 412 (W.D. Mich. 1981); *Tiller* v. *Amerada Hess Corp.*, 540 F. Supp. 160, 165 (D.S.C. 1981); *Bellmore* v. *Mobil Oil Corp.*, 524 F. Supp. 850, 853 (D. Conn. 1981); *Ferriola* v. *Gulf Oil Co.*, 496 F. Supp. 158, 162-63 (E.D. Pa. 1980), *aff'd mem.*, 649 F. 2d 859 (3d Cir. 1981); *Munno* v. *Amoco Oil Co.*, 488 F. Supp. 1114, 1118-21 (D. Conn. 1980); *Pearman* v. *Texaco, Inc.*, 480 F. Supp. 767, 770 (W.D. Mo. 1979). Moreover, the fact that proposed terms are presented on a "take it or leave it" basis or that more acceptable alternatives are available are not indicative of bad faith conduct barred by the PMPA. *Brach*, 677 F. 2d at 1223; *Meyer*, 541 F. Supp. at 330; *Baldauf*, 553 F. Supp. at 416.

Though some cases indicate that use of a rental formula that has no basis in reality is evidence of bad faith, *see, e.g., Meyer*, 541 F. Supp. at 331 ("totally irrational provisions might bear upon a franchisor's good faith"); *Tiller*, 540 F. Supp. at 163, here plaintiff argues only that he was treated differently from other similarly situated dealers. plaintiff's first claim concerns his projected GPC profit margin of 10.22¢ per gallon. Though it appears that plaintiff's attorney has examined the files of most or all of the Mobil dealers in the Chicago area, plaintiff argues that he was treated differently from only one other dealer, Donald Fredenhagen, who was assigned a projected GPC profit margin of 7.0¢ per gallon. In fact, defendant has submitted evidence showing that the projected GPC profit margin for all Chicago-area dealers whose contracts were dated

March 8, 1982 or later was in the 10.0 to 10.6¢ per gallon range, with the exception of Fredenhagen. *See* Myers Aff. ¶16 & Ex. E. Fredenhagen's lower rate is said to have been based upon the facts that a) Fredenhagen was a new dealer; b) the service station premises were under construction; c) he held a "trial franchise" for a one-year period only; and d) the station was being converted from a partial self-serve operation to a full self-serve operation. Myers Aff. ¶19. The last factor is important because profit margins are generally lower for full self-serve stations than for partial self-serve stations. *Id.* Lippo's only response to this is that Fredenhagen is a "high-volume" dealer comparable to Lippo and that Mobil's evidence indicates only that Mobil's "good business judgment" standard, *see* p. 5 *supra*, was applied to Fredenhagen but not to Lippo. These arguments are without merit. Defendant's evidence shows that Lippo's projected GPC profit margin was within the range for other dealers with partial full serve operations. Moreover, as we have noted, the projected margin was below Lippo's actual margin at the time the projection was made. Defendant's evidence with respect to Fredenhagen, which plaintiff has not rebutted, shows that Fredenhagen is not situated similarly to plaintiff. Thus, plaintiff's showing that Fredenhagen was treated differently from him does not constitute evidence of discriminatory treatment actionable under the PMPA. We hold that plaintiff's projected profit margin was determined in good faith and in the normal course of Mobil's business.

In support of his claim that his gasoline purchase volume was calculated in a discriminatory fashion, Lippo points to nineteen other Chicago-area dealers who he claims were treated differently. As to three of these dealers, the uncontradicted evidence shows that the "higher of DOE or 1980" formula was applied. *See* Myers Aff. ¶10 & Ex. D. Twelve other dealers benefitted from a new formula implemented by Mobil on March 8, 1982. This formula was not applied to plaintiff; we will deal

with the issues raised by the application of the new formula below. This leaves four dealers whose volumes were determined ostensibly according to the same formula as plaintiff's but who were assigned volumes different from both the DOE and 1980 amounts. For two of these dealers, Messrs. Hartley and Rivera, the volume was adjusted downward; for the other two, Messrs. Fox and Navarro, the volume was adjusted upward. *See* Myers Aff. ¶10. Rivera requested an adjustment because a competitor station had recently opened across the street from him. Myers Aff. ¶13. Mobil granted a 28.2% decrease. *Id.* Ex. H. There is no evidence indicating the basis for the specific amount of the decrease. Mobil cannot explain the reasons for the 27.9 decrease given to Hartley, as it cannot locate the records relating to the decrease. *Id.* ¶14. The increases granted to Fox and Navarro resulted from the fact that those dealers had had unusual circumstances that made their 1980 actual sales abnormally low; the dealers requested upward adjustments so that they could obtain a quantity of gasoline sufficient to supply their "normal" demand. *Id.* ¶¶11-12 & Exs. F, G.

While the above evidence does indicate that Mobil's gasoline volume formula was somewhat more flexible than it first appears, that does not help plaintiff's case here. There is no evidence that plaintiff requested an adjustment of the volume listed in the proposed contract. More importantly, plaintiff has not submitted any evidence showing special circumstances that would have warranted an adjustment had he requested one. In short, plaintiff cannot claim discriminatory application of the gasoline volume formula where he has failed to show that he either requested or deserved and adjustment for his individual circumstances. Therefore, we hold that he cannot maintain his PMPA claim to the extent that it is based on alleged discriminatory application of the pre-March 8, 1982 gasoline volume formula.

Things are somewhat different with respect to Mobil's

"standard" incrementalization of the proposed rent increase. This was the supposedly uniform plan by which a proposed GPC rental increase was to be spread out over the first two years of a three year proposed contract. As we have earlier detailed, in the present case Lippo's first year GPC rental was to be $1937 per month, and his second year rental was to be $2163 per month. If Mobil was applying its standard two step plan properly, that would mean that Lippo's GPC rental in the last year of his 1979-82 contract was $1711. Though the parties disagree on what Lippo's rent actually was, defendant has not referred us to any evidence whatsoever that it was $1711 or anything near that. Mobil suggests that Lippo's actual rent was $1439.42 per month. *See* Reply to Plaintiff's Memorandum at 5. Lippo disputes this, stating without evidentiary support that his average monthly rental in 1981 was $792.13. *See* Reply to Defendant's Memorandum at 6. For present puproses, we cannot and need not resolve this dispute, for even if Mobil's figures are correct they do not justify the particular two-step increase contained in the proposed contract. Mobil has claimed that the two-step program is one of general application; if that is true it was misapplied selectively as to plaintiff, at least as far as we can tell at this point. This part of plaintiff's PMPA claim therefore withstands the motion for summary judgment.[3]

Plaintiff's final claim of discriminatory treatment involves the formula itself. As we noted earlier, defendant

---

[3] Given the conflicting views on the issue and the lack of admissible evidence to support either party's view of the facts, we cannot grant plaintiff's cross motion for summary judgment either. We do not suggest that if the increment was improperly calculated as to plaintiff he will necessarily prevail. He will of course be required to show that Mobil acted in bad faith as defined in the PMPA. Evidence that his increase was calculated improperly would support a showing of bad faith.

explained the alleged difference in treatment concerning gasoline purchase volume by stating that as to twelve of the nineteen dealers in plaintiff's sample, a different formula was used. The new formula is explained in the affidavit of Charles A. Myers. Under the new formula the operative word was "normal volume." "Normal volume" was defined as

> the realistic potential of the location operating under normal marketing conditions. The realistic potential would be the best projection for the location assuming a competitive pricing posture and applying the other retail factors such as hours, service and appearance in a reasonable manner.

Myers Aff. ¶5 & Ex. C. Neither plaintiff nor defendant has suggested what plaintiff's "normal volume" would have been under the new formula, but to the extent that plaintiff complains that the volume he was assigned under the old formula was unreasonable it is at least arguable that the new, more flexible formula would have been more favorable to him.

Plaintiff complains that Mobil's failure to calculate his rent using the "normal volume" formula was discriminatory treatment aimed at driving him out of business. Defendant admits that after March 8, 1982, the new formula was used. However, defendant states that plaintiff's contract "package" was prepared on March 5, 1982, before the regional office covering the Chicago area even had notice of the new system. It is true that the proposed contracts submitted to plaintiff are dated March 5, 1982. *See, e.g.*, Complaint Group Ex. B. However, as we previously noted, defendant's own evidence suggests that the documents were not presented to plaintiff until March 17, 1982. *See* p. 4 *supra*.[4] We have no idea of the process within Mobil's offices by which the

---

[4] While there is some suggestion that "draft" copies

*(Footnote continued on the following page)*

proposed contract was formulated or why the March 8 formula was not applied to plaintiff's lease. Since the new lease was not to go into effect until October 1, 1982, it is unlikely that defendant could justify the failure by pointing to time pressures. On the present record, the disparate treatment of which plaintiff complains could have been the result of standard operating procedure within the Mobil bureaucracy, or it could have been the result of an attempt by Mobil to force plaintiff out of business. Mobil has not, however, presented us with any evidence explaining why the March 8 formula was not or could not have been applied to plaintiff. Since it is possible that the reason was Mobil's bad faith, or that Mobil did not act in the normal course of business, Mobil is not entitled to summary judgment. Since we have no evidence from which we can infer that Mobil's subjective intent was to put Lippo out of business or drive him to the wall, we cannot grant Lippo summary judgment either.

To summarize, partial summary judgment is granted to Mobil on plaintiff's PMPA claims relating to elimination of the ten-day cure provision, the size of his proposed gasoline purchase requirement, the size of his projected GPC profit margin, and the calculation of his gasoline volume for rental purposes. Mobil's motion for summary judgment is otherwise denied. Plaintiff's motion for summary judgment is denied. The parties are to submit final pretrail materials by January 5, 1983. The case is set for final pretrial conference on February 15, 1983 at 4:30 p.m., and for trial on April 16, 1983 at 9:30 a.m.

---

4 *(Continued)*

were shown to plaintiff on March 2, 1982, *see* Boyer Aff. ¶4, this is far from clear. In any event this would not necessarily bar plaintiff's claim, as explained above.

ENTER:

PRENTICE H. MARSHALL

Prentice H. Marshall
District Judge

DATED: November 22, 1983.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**BRUCE LIPPO d/b/a Walden-Woodfield Service Station,**
*Plaintiff,*

*v.*

**MOBIL OIL CORPORATION,**
*Defendant.*

No. 82 C 3966

## MEMORANDUM OPINION

Prentice H. Marshall, District Judge

Plaintiff Bruce Lippo operated a Mobil service station in Schaumburg, Illinois called the "Walden-Woodfield Service Station" pursuant to a franchise relationship with defendant Mobil Oil Corporation (Mobil). The relationship was governed by a contract, service station lease, and several other documents. The initial term of the contract and lease was from October 1, 1979 through September 30, 1982. During March, 1982 Mobil presented plaintiff with a proposed rental package for the three-year term beginning October 1, 1982. The key element of that package for purposes of this action was its increased rental amount. Lippo did not execute the proposed documents. And on March 25, 1982, Mobil sent plaintiff a 180-day notice of nonrenewal, as provided for in a rider to the original contract.

Plaintiff brought this action seeking declaratory relief and damages following Mobil's nonrenewal of his franchise. In count 1 plaintiff alleges that the nonrenewal violated the contract. And in count 2 plaintiff alleges that the nonrenewal violated the Petroleum Marketing Practices Act (Petroleum Act), 15 U.S.C. §§2801-06 (1982). Mobil has counterclaimed for a declaratory judgment of non–breach and non-violation of the Petroleum Act.

On November 22, 1983 we ruled on the parties' cross motions for summary judgment. Partial summary judgment was granted to Mobil on plaintiff's Petroleum Act claims relating to elimination of the ten–day cure provision, the size of his proposed gasoline purchase requirement, the size of his projected gasoline profit center (GPC) profit margin, and the calculation of his gasoline volume for rental purposes. Defendant's motion for summary judgment was otherwise denied. Plaintiff's motion for summary judgment was also denied. Rather than proceed to trial, the event most dreaded by trial lawyers, the parties have taken some additional depositions and have renewed their motions for summary judgment. Plaintiff also asks that we reconsider our earlier decision.

Plaintiff challenges two of the four Petroleum Act claims resolved in Mobil's favor: 1) the projected gasoline profit center (GPC) profit margin, and 2) the projected gasoline purchase requirement. He also seeks reconsideration of the claims relating to: 1) incrementalization of the proposed rent increase, 2) Mobil's failure to use the "normal volume" under the March 8, 1982 formula, and 3) Mobil's unilateral rent reduction program. Mobil moves for summary judgment on the two-step rental increase and on its application of the pre-March 8, 1982 formula.

**Projected GPC Profit Margin**

The GPC profit margin is one of two components of the rental amount charged the dealer by Mobil. The GPC is based on the projected profits from the sale of gasoline. In Lippo's case, the GPC component was determined by applying the following formula:

1) The Department of Energy (DOE) Base Period Volume for the dealer from November 1, 1977 through October 31, 1978 is ascertained.

2) The dealer's actual gasoline sales for 1980 are determined.

3) The larger of 1) or 2) is used as the "normal" volume

for the dealer.

4) Mobil then determines a projected gasoline profit margin based on present margins, personal observation, experience, and good business judgment.

5) The figure determined in 4) is multiplied by that determined in 3) to arrive at the dealer's projected gross profit from the sale of gasoline.

6) The projected gross profit number is then "plugged into" a standard GPC Rent Schedule to determine the annual rental.

Affidavit of Thomas J. Kehoe, ¶7.

The normal volume for Lippo's service station was the DOE defined base period volume -- 1,283,725 gallons. As Mr. Chowdhury, the Mobil marketing representative who calculated plaintiff's new rental amount, explained, this figure was then divided into the various kinds of gasoline, based on his projected breakdown of sales, 35-40% going to full serve, and the balance to self serve. Chowdhury Deposition Transcript (Dep. Tr.) at 52-54. The projected margins were then computed on each kind of gasoline. For example, the projected margin on super unleaded gasoline sold at a full serve pump was 20¢ per gallon. The projected GPC profit figure of 10.22¢ per gallon is the quotient obtained by dividing the gross profit from all kinds of gasoline by the total number of gallons. The projected gross product number is then plugged into a rent schedule to determine Lippo's annual rent.

Plaintiff complains that Mobil, in projecting both a high sales volume and a profit margin of 10.22¢ per gallon, has ignored the relationship between price and volume. He asserts that he cannot sell the required volume of gasoline at the stated profit margin. Under plaintiff's economic analysis, Mobil's determination of the GPC profit margin could not be based on the exercise of good business judgment.

Plaintiff asserts that his actual profit margin in

January, 1982 (which was higher than the projected GPC profit margin) was known by Mobil to be uncompetitive. He then argues that Mobil ignored its own policies in computing a GPC profit margin which was not competitive and which was incompatible with the projected sales volume. The effect of Mobil's projected figures, according to plaintiff, would be to force him to lower his retail prices in order to sell the required volume.

We find plaintiff's emphasis on a possible correlation between the projected GPC profit margin and the projected sales volume to be misplaced. Mobil's formula uses the higher of two numbers -- the DOE base period volume or the dealer's actual 1980 gasoline sales -- as the dealer's normal volume. Plaintiff ignores this step in the calculation and would have us conclude that Mobil purposely projected a high sales volume.

We also find plaintiff's lack of competitiveness argument to be circular. Lippo accuses Mobil of computing a GPC profit margin of 10.22¢ per gallon and argues that the effect of this projection is to force him to lower prices. But he ignores the effect of lower prices -- his new lower prices would be more competitive with those of other dealers in the area.

Plaintiff also reiterates his claim that he has been treated differently from the one similarly situated dealer in the Chicago area, Mr. Fredenhagen. Lippo compares his 1981 volume of 511,694 gallons to Fredenhagen's projected volume of 575,000 gallons during his first year of operation. He also seeks to compare his 10.22¢ per gallon GPC profit margin with Fredenhagen's projected 7.0¢ per gallon GPC profit margin. This argument is not persuasive. *See Lippo* v. *Mobil Oil*, No. 82 C 3966 (N.D. Ill. Nov. 22, 1983) (*Lippo I*), slip op. at 9-10.

In essence, plaintiff complains of a conflict between his independent retail pricing policy and Mobil's projected sales volume and profit margin figures. The fact Mobil's

projections represent a different view of the Walden-Woodfield Service Station's profitability in the future does not necessarily mean that the defendant has discriminated against plaintiff in its computation of an increased rental amount. On this motion for reconsideration, Lippo has offered no new evidence to show that Mobil treated him differently from similarly situated Chicago-area dealers.

The motion for reconsideration on plaintiff's Petroleum Act claims relating to the size of his projected gasoline profit center (GPC) profit margin is denied.

**Projected Gasoline Purchase Requirement**

In our earlier decision, we assumed that plaintiff had dropped his claim relating to the gasoline purchase requirement. *Lippo I*, slip op. at 7 n. 2. Plaintiff asks that we reconsider our finding because we failed to consider the relationship between the gasoline purchase requirement or dealer's normal volume, profit margins and price. For the reasons stated in our discussion of Mobil's computation of the gasoline profit center (GPC) profit margin, plaintiff's motion to reconsider his gasoline purchase requirement claim is denied.

**The Two-Step Rental Increase**

For a lease proposed in 1982, any increase in rent was to be phased in in two equal increments, with the dealer paying the full rental amount in the second year of the three-year lease. At the time of our earlier decision, the parties disagreed as to Lippo's rental amount for the last year of his 1979-82 contract. As we could not resolve the dispute between the parties on the record before us, we declined to enter summary judgment for either party. *Lippo I*, slip op. at 12-13. Both parties have renewed their motions for summary judgment on this claim.

Mobil has now explained the computation of the rental amount in its proposed three-year contract. Lippo's 1981 rent was irrelevant under the Mobil rental program. The incremental rent increase was computed by applying the

following mobil formula.

1) The dealer's "present rent" is calculated by taking the dealer's DOE defined base period volume and multiplying that figure by 01.6¢ per gallon.

2) The "present rent" figure is divided by 12 to establish a monthly "present rent."

3) The monthly "present rent" figure is subtracted from the monthly GPC rental amount; the difference between the "present rent" and the GPC rental amount is then divided by 2 to obtain the first contract year increment.

4) The monthly "present rent" and the increment amount are added to obtain the first year rental amount.

Second Affidavit of Charles A. Myers, ¶6. Applying this formula to Lippo's situation resulted in the following calculations:

| | |
|---|---|
| DOE Base Period Volume | 1,283,725 gallons |
| 1.6 cents | .016 |
| Annual "Present Rent" Figure | $20,540 |
| Divided by 12 for Monthly "Present Rent" Figure | 1,711 |
| Monthly GPC Rental Increase Over Monthly "Present Rent" Figure ($2,163 minus $1,711) | 452 |
| Divided by 2 for Equal Increment | 226 |
| Increment Added to Monthly Present rent for First Year Monthly Rent Under New Contract | 1,937 |

*Id.*, ¶9.

Plaintiff apparently concedes the merits of defen-

dant's argument. Plaintiff's response to the motion for summary judgment does not discuss the two-step rental increase. Mobil's motion for summary judgment on plaintiff's Petroleum Act claim with regard to the two-step rental increase is granted. Plaintiff's motion for reconsideration on this claim is denied.

**The March 8, 1982 Formula**

During the period of time in which Lippo was considering the new proposed three-year contract, Mobil changed its formula for computing "normal volume." The formula applied to plaintiff defined the maximum contract volume as the higher of two numbers -- the DOE defined based period volume or 1980 calendar year volume. This was changed by Mobil on March 8, 1982.

> *Maximum:* The maximum will be normal volume which is defined as the realistic potential of the location operating under normal marketing conditions. The realistic potential would be the best projection for the location assuming a competitive pricing posture and applying the other retail factors such as hours, service and appearance in a reasonable manner.

Mobil Interoffice correspondence, from G. J. Kurz, Acting Retail Manager, dated March 8, 1982.

Plaintiff asserts that defendant discriminated against him by failing to apply the new, more favorable formula in determining his future rental amount. Defendant's response is three-fold. First, Mobil states that the new formula was not applied retroactively. All contract renewals prepared prior to March 8, 1982 remained unchanged. Second, under the terms of plaintiff's original contract, Mobil was required to give 180 days' notice of termination or the contract would automatically renew. This meant that the parties were required to reach an agreement on the terms of the new contract prior to March 31, 1982. The time pressure made it impossible to apply the new "normal volume" formula. And third, defendant asserts that the

resulting rent under the new formula would have been the same. On October 28 1982, the new formula was applied by Mobil's marketing representative, Abu Chowdhury, to plaintiff's successor. The "normal volume" figure computed for Lippo's successor's lease under the March 8, 1982 formula was identical to the figure used in Lippo's renewal package. Second Affidavit of Charles A. Myers.

The record contains ample evidence that Lippo's contract renewal package was prepared and discussed with him prior to March 8, 1982. Plaintiff has offered no evidence to show that he was treated differently from other dealers whose contract renewal documents were prepared prior to March 8, 1982. Plaintiff has offered no evidence to rebut defendant's assertion that it was its established business practice to apply amendments to its nationwide rental policy prospectively only.

Defendant's motion for summary judgment on plaintiff's claim with regard to the application of the pre-March 8, 1982 "normal volume" formula is granted. Plaintiff's motion for reconsideration of this claim is denied.

**Unilateral Rent Reduction Program**

Plaintiff complains that Mobil discriminated against him in the administration of its rent reduction program. Mobil initiated a program of rent reductions in April, 1981. By letter dated January 25, 1982, Mobil dealers, including Lippo, were advised of unilateral rental adjustments for the months of January and February, 1982. Plaintiff complains here of Mobil's failure to advise him of the continuation of its rent reduction program beyond February 28, 1982. He asserts that Mobil's conduct is further evidence of its bad faith during the renewal period.

Plaintiff's claim of discrimination under the rent reduction program is not cognizable under the Petroleum Act because Mobil, in implementing that program, was not proposing a change in the terms of plaintiff's franchise.

The rent reduction program was initiated as a temporary measure, which was cancellable by Mobil at will.

Plaintiff's motion for reconsideration of its claim relating to Mobil's unilateral rent reduction program is denied.

**Summary**

Defendant's motion for summary judgment on the two-step rental increase and its application of the pre-March 8, 1982 formula claims is granted. Plaintiff's motion for reconsideration is denied in its entirety.

In its motion for summary judgment, Mobil advised the court that the two-step rent increase and pre-March 8, 1982 formula issues were the only issues remaining in this action. Cause set for entry of judgment dismissing plaintiff's action with costs to defendant on September 27, 1985 at 9:30 a.m.

ENTER

Prentice H. Marshall
District Judge

DATED: September 11, 1985.

JUDGMENT IN A CIVIL CASE

# United States District Court

| | |
|---|---|
| BRUCE LIPPO<br><br>*v.*<br><br>MOBIL OIL | Northern District of Illinois Eastern Division<br><br>82 C 3966<br><br>Honorable Prentice H. Marshall Judge Presiding |

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Count 2 of the counter-claim of Mobil Oil is dismissed without prejudice to a fee petition following the entry of judgment. All matters in controversy having been decided judgment entered in favor of defendant Mobil Oil and against the plaintiff, Lippo, dismissing plaintiff's action with costs to the defendant.

| CLERK | DATE |
|---|---|
| H. Stuart Cunningham | 9-27-85 |
| (BY) DEPUTY CLERK | |

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

**BRUCE LIPPO d/b/a Walden-Woodfield Service Station,**
*Plaintiff,*

*v.*

**MOBIL OIL CORPORATION,**
*Defendant.*

No. 82 C 3966

The deposition of C. A. Myers, called by the plaintiff, for examination, pursuant to notice, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Annamarie Rimkevicius, C.S.R., a notary public within and for the County of Cook and State of Illinois, at 300 North State Street, Chicago, Illinois, on the 8th day of February, A.D., 1984.[5]

* * * *

[5] Full deposition transcript filed of record in the District Court.

[31] A. It is a town.

Q. It is a town.

A. It is a southern suburb. I don't know the exact address of it. I am not familiar with that area.

Q. Is that a suburb of Chicago?

A. Yes. It is one of the southern suburbs.

Q. You know what margin was established for that station?

A. I have no idea.

Q. Have there been any other stations within the district that have been converted to full/self service?

A. I don't think so. There may have been some prior to my coming into this position. There are salary operations that are full/self service.

Q. The fact that Mr. Fredenhagen was a new dealer, did that effect the -- what effect if any did that have on his projected gasoline margin?

A. I don't believe it had any effect.

Q. The fact Mr. Fredenhagen was a trial franchisee, what effect did that have on his profit margin?

Please feel free to look at your affidavit.

A. Would you ask the question again? On his profit margin?

Q. Profit margin.

[32] A. The fact he is a trial franchisee is one year. All right. The problem was during that one year period, the station was going to be converted, which obviously would adversely effect his gross profit margin.

Q. So?

A. So the same factor would hold if it was a three year contract.

Q. So it made no difference that he was a trial franchisee?

A. Other than the fact that he would have -- the fact that the construction would have been going on in that first year would have had an effect on his profit margin.

Q. We have already listed that as a consideration. You also listed the fact that he is going to be a trial franchisee for a one year period.

A. Right.

Q. What effect does that have on his profit margin?

A. I don't know that it has any effect on his profit margin, the fact that he is a trial franchisee. I don't know this particular station or what is out there or what he is actually doing other than the records that [33] I see.

Q. You see that the operation of the service station was being converted from a Mobil owned and operated service station to a franchisee. I take it it is a franchisee operation?

A. Yes.

Q. What effect does that have on the profit margin?

A. It should improve the profit margin.

Q. For whom?

A. For the dealer because this was a training session before. At the training station, all employees were Mobil employees and subject and recipients of all the benefit packages that we have, that I have. So the labor was excessively high there.

Q. So the labor would effect the profits?

A. Right.

Q. But not the profit margin, would it?

A. The gross profit, no.

Q. We are talking about profit margin.

A. The other factor was not a full/self serve. It would reduce Mr. Fredenhagen's going to full/self versus a partial self serve.

Q. I understand that. You mentioned that.

A. I am not sure what profits we are talking about [34] then.

Q. Your statement is in Paragraph 19, Mr. Fredenhagen was assigned a projected gasoline margin which was

approximately three cents lower than the projected gasoline margin assigned to other service station dealers because - - And, "B", you say the operation of the service station was being converted from a Mobil owned and operated station to a franchisee. And Mr. Fredenhagen was a new dealer.

A. Okay. It would have been the conversion going from a partial self serve operation to a full self serve operation. And the differential between a full self serve total gasoline gross profit margin, the weighted average margin versus a full self serve weight average margin is at least three cents a gallon.

Q. That's what you are stating in Subparagraph D, is it not, that station was being converted from partial to full self serve?

A. Right, right.

Q. And I want to go up to "B" and understand what the signficance of that subparagraph is to his profit margins, if any.

A. I am not sure that it has any to the profit margins. [35]

Q. Were there other dealers in your district who were having construction performed at their stations?

A. I am sure there were.

Q. Was that factor taken into account in establishing their profit margins?

A. Let's go back to your question: Is there any dealers that were having construction in the district? Of course, we were replacing tanks at locations. We were putting in snackshops. There was all types of construction. There was all types of construction always going on.

Where the construction is adversely effecting the volume performance of the location, such as like Mr. Lippo had with the tanks, we weighted a rental rebate to those dealers to comprehend that down time.

Q. Why is it that effects the profit margin and not the volume of gasoline that has to be sold?

A. Why does that effect the profit margin?

Q. The man is not selling as for a particular position of time within a year. That effects his volume of sales, is that correct?

A. Okay. You have got in this situation, you have got the station being basically him out of gasoline business for a period of time. That's a short run. And [36] the long run, that gas station is a full self serve station. The fact that the seven cents per gallon is used is the maximum our region would allow us to use, for the maximum they would allow us to use, is to comprehend the fact under normal operating conditions, this station is going to have to list on a gross profit of seved cents a gallon.

Q. Is there a range then? You mentioned this is a minimum. This seven cents per gallon is a minimum. Is there a range rather than an applying seven cents across the board? Is there a range that could be utilitized for a full self service operation?

A. Any cents per gallon figure down to seven cents per gallon was the approval level of the district for a full self serve operation.

Q. For a partial self service operation, you look at the weighted average of the gasoline sold; is that correct?

A. We do for both.

Q. I am sorry.

A. We do for both full self serve and partial self serve.

Q. You make the statement here in Paragraph 19 that from your experience and training with the Mobil Oil Corp., [37] it is your opinion that the per gallon profit margin associated with a self service operation is three to four cents below the per gallon profit margin associated with a partial self serve operation?

A. Right.

Q. Okay. Now, when Mr. Fredenhagen took over this service station, I believe in September 1982, he was operating a partial self service operation initially; is that correct?

A. I believe so. I don't know exactly when the construction started.

MR. McKENNA: Will you mark this as the next group exhibit, please?
(Whereupon, Plaintiff's Group Exhibit 16 was marked for ID by the reporter.)

MR. McKENNA: Q. Would you take a look at that and tell me what it is?

THE WITNESS: A. This is a lease proposal package.

Q. For Mr. Fredenhagen's operation?

A. Right.

Q. Would you turn to the service station gross profit projection worksheet?

Here is a copy, Jim.

Have you located that?

**Part of Exhibit B to the**
**Affidavit of Thomas J. Kehoe**
**Filed as Docket No. 24**

## MODIFIED RENT PLAN JUNE 1980

### SUMMARY OF MODIFICATIONS

1. No more 5 year leases; i.e., only trial franchises and 3 year leases.
2. Elimination of sign and equipment rentals (except C.C. imprinter).
3. An optional GPC/APC escalator of up to 20% exercisable during the second and third year of a 3 year lease.
4. GPC rental rate to be the same for all configurations.
5. "Normal Volume" is established based upon the realistic potential of the service station operating under normal marketing conditions. *However*, for the purposes of the rent calculation "Normal Volume" will be the DOE defined base period volume *as long as controls are in effect.*
6. Modified GPC Rental will be a flat rental based on a percentage of the projected gasoline yearly gross profit.
7. A provision will be incorporated into the service station lease to provide flexibility to adjust a dealer's rent once a calendar year if the yearly volume falls below 90% of the allocation base as a result of a reduction in allocation levels.
8. Modified service bay APC Rental will become a flat rent based on 20% of the projected yearly gross profit excluding gasoline.
9. Other APC rentals - no changes.

### MODIFIED GPC/APC RENT IMPLEMENTATIONS

* New dealers will pay rent in line with the modified rental program.
* For existing dealers whose leases are renewed, the GPC/APC rentals will be increased as follows:

* **GPC RENTAL:**
  1. For leases effective 1/1/81 - 12/31/81=3 equal escalations in the next three years.
  2. For leases effective 1/1/82 - 12/31/82=2 equal escalations to take place in years 1 and 2.
  3. For lease effective starting 1/1/83=rentals to increase immediately to the objective rental.

* **APC RENTAL**

  Will increase to the full amount at the time of lease renewal.